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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 72-1242

DURELL PRODUCTS, INC.,

Petitioner,

v.

AJAX REALTY CORPORATION,

Respondent.

BRIEF OPPOSING
PETITION FOR WRIT OF CERTIORARI

Appellee, (hereinafter referred to as plaintiff), prays that the Petition for Writ of Certiorari herein filed by Petitioner, hereinafter referred to as defendant, be denied.

QUESTION PRESENTED

Plaintiff agrees with the question presented in defendant's petition.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Plaintiff agrees with the constitutional provision and statute involved

as set forth in defendant's petition, except that plaintiff does not agree that there is any constitutional question presented in the petition.

STATEMENT OF THE CASE

The statement of the case as presented in defendant's petition is substantially correct.

REASONS FOR NOT GRANTING THE WRIT

The "Long-Arm Statute" involved herein is Section 8-81.2 of the Code of Virginia, 1950, as amended, and is set forth on Page 2 of defendant's petition. This Virginia Statute conforms to Article One of the Uniform Interstate and International Procedure Act. A vast number of other states have enacted Long-Arm Statutes that differ substantially from the Uniform Act, and therefore it is not surprising that the decisions from the various states are lacking in uniformity. Further, there can be no question, but that there are conflicting decisions among the states even with the same or similar statutes, but it is still a state's prerogative to interpret its own laws so long as those interpretations do not offend the mandates of the Constitution. Defendant, in its petition, admits that the universal rule today is the so called "minimal contact" concept;

that is that due process requires only that a foreign corporation have certain minimal contacts within the territory of the forum. That concept was set forth very clearly in the landmark case of International Shoe Company v. Washington, 326 U.S., 310, 66 Supreme Court 154, 90 L. Ed. 95. In that case there was no similar statute, and of course it was a 1945 decision.

The doctrine enunciated in International Shoe was followed by this Court in McGee v. International Life Insurance Company, 355 U.S. 220, 78 Supreme Court 199, 2 L. Ed. 2nd 223. A California Statute came under the scrutiny of the Court, which statute subjected foreign corporations to suit in California on insurance contracts with residents of California even though they could not be served in that state. This Court had no difficulty in disposing of the alleged denial of due process, and stated "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of expanding state jurisdiction over foreign corporations and other non-residents."

Apparently defendant in its petition relies primarily on the case of Hanson v. Denckla, 357 U.S. 235, 78 Supreme Court, 228, 2 L. Ed. 2nd 1283. That case is not even remotely in point factually to the case here in question. An action was brought in a Florida Court to subject an

out-of-state trustee under the provisions of a will to the jurisdiction of the Florida Court, where the trustee under the will had absolutely no contact with the State of Florida. This Court did hold in that situation that absent some minimal contact with the forum state that there was a denial of due process. It should be pointed out however, that even under that situation and as far back as 1958 when the case was decided, Justice Black and Justice Douglas dissented, and felt that the Florida Court should be permitted to exercise jurisdiction. An excellent law review article may be found in 69 Michigan Law Review 300 where the Hanson case is rather severely criticized and numerous cases are cited where the Hanson doctrine is seriously limited. Further, in the Hanson case there was no similar statute to the one here in point.

Defendant also relies heavily on the case of Erlanger Mills v. Cohoes Fibre Mills, 239 Federal 2nd 502. In that case the plaintiff solicited the defendant concern in New York and entered into a contract whereby defendant was to supply certain products to plaintiff in North Carolina, said shipment to be F.O.B. New York. The purchase price was $17,000.00 (a far cry from the $37,000.00 involved in this case). The North Carolina Statute involved was broad and sweeping and vastly different from the Virginia Statute here in issue. The

North Carolina Statute covered virtually anything manufactured outside of the State of North Carolina and shipped into the State, directly or indirectly. The decision, therefore, in Erlanger Mills, really has no application to the facts of this case.

Next defendant relies upon the case of Beaty v. M. S. Steel Company, 276 F. Sup. 259. There, the Maryland District Court examined several Maryland cases interpreting the statute involved and came to the conclusion that the Supreme Court of the State of Maryland would not uphold jurisdiction in the Maryland Courts based on facts of that case. While the statute involved was similar to the statute with which we are now concerned, the Maryland Statute was nontheless considerably more restrictive than the Virginia Statute. The court in Beaty did, however, consider the substantial revenue provision, but the Maryland Statute differed from Section 8-81.2 (a)(4) of the Virginia Statute by limiting the substantial revenue provision to food or services. Of course the Virginia Statute contains no such limitation. It is respectfully submitted that had the Maryland Statute been as broad as the Virginia Statute, i.e., deriving substantial revenue from goods or services, then the decision would have been different.

In this case defendant Durell undertook to supply certain windows to C & S Sales Company, the windows pursuant to that contract to be shipped to Chicago for glazing. Before the windows were shipped, C & S notified defendant that the windows were to be shipped unglazed directly to the job site in Virginia. Defendant did so, and thereby became an agent for C & S in supplying the windows to the vendee of C & S. The purchase price of the windows was $37,000.00.

In Jackson v. National Linen Service Corp., 248 F. Sup. 962, the United States District Court for the Western District of Virginia stated:

> "Although $25,000.00 might seeem a small amount, when compared to Hysan's total volume of sales, the Court believes that it is substantial enough to satisfy the Virginia Long-Arm Statute. Further, it is clear that defendant was aware that its products were being sold in Virginia and so might reasonably have expected plaintiff to use and be affected by it.";

That decision construes the identical statute involved herein. If $25,000.00 is a substantial amount of revenue, then most certainly $37,000.00 is a more substantial amount.

In the case of Johnson v. Equitable Life Insurance Society, 254 New York Sup. 2nd 258, the New York Court held $1,798.20 was a substantial amount of revenue, and the statute involved, CPLR Section 302(a)(2) was identical to the Virginia Statute.

It is respectfully submitted that the defendant herein in becoming agent for C & S Sales Company, who shipped the windows, thereby contracted to supply services or things in this State, by shipping grievously defective windows into this State, caused tortious injury and derived substantial revenue from goods used or consumed in this State. Though in no way factually in point, the case of U.S. v. Montreal Trust Company, 358 F. 2 239, certiorari denied, 384 U.S. 919, 86 Supreme Court 1366, 16 L. Ed. 2nd 440, upholds the constitutionality of an identical statute.

In the trial court's memorandum order set forth in Appendix A of defendant's petition, it is implicit that the trial court did not recognize the statute here involved as a single-act statute, nor was there as of that time a Virginia decision directly in point. In a 1971 decision, however, the Supreme Court of Virginia in the case of John G. Kolbe v. Chromodern Chair Company, 211 Va. 736, 180 S.E. 2nd 664 held that the Virginia Long-Arm Statute was a single-act statute.

Another case worthy of citation is that of St. Clair v. Righter, 250 F. Sup. 148 (Western District Virginia, 1966). This case involved an action for libel and slander where letters libeling the plaintiff were written by the defendant outside Virginia, but mailed into this State. Although the District Court denied jurisdiction under the Long-Arm Statute, it nevertheless found that jurisdiction was vested in Virginia. The Court stated:

> "The assumption of jurisdiction in this case is not merely a bald exercise of power, as this Court believes that Virginia has a great interest in, and significant contact with this situation making it reasonable to assert personal jurisdiction over these defendants. Virginia as the forum State and place of injury can quite validly desire to fix the measure of protection to which each person injured within the State is entitled against his fellows and determine whether the damage was wrongfully inflicted, thus giving rise to a cause of action in tort. This interest is rendered even more substantial by the fact that the plaintiff in this case is a domiciliary of Virginia.
>
> "Moreover the Court does not believe it would be unfair to

subject the defendants to in personam jurisdiction in this case, as they purposely mailed letters into the State whose purpose, presumably, was to encourage other stockholders of Jewell Ridge Coal Corporation to join in a suit against the plaintiff. It was not merely fortuitous, then, that the injury (if there is found to be one at the trial on the merits) occurred in Virginia; rather it was a clear example of "voluntary action" taken by the defendants which was calculated to have an effect in the forum State. For an analagous case, see the conflict of laws decision of Young v. Masci, 289 U.S. 253, 53 S. Ct. 599, 77 L. Ed. 1158 (1933). There the defendant, a resident of New Jersey, lent his car to another and gave him permission to drive it into New York. The borrower did drive into New York and injured plaintiff, a domiciliary of that State, who brought this action in New Jersey for the injuries received. The applicable New York statute held a car owner liable for the negligence of anyone using his car on his business or with his permission, express or implied. In deciding to apply the law of New York, the Supreme Court said that the defendant had given his permission for the car to be driven into New York and therefore subjected himself to

the legal consequences imposed by that State.

"A significant contact, which has been alluded to some extent above, is the fact the under conflict of law rules, the law of Virginia could, and probably would, be applied in this case regardless of where the suit was brought. There is a general rule (if there can be said to be any 'rules' in this area of conflicts) that the law of the place of injury governs the right of action for a tort, regardless of where the act or omission takes place...

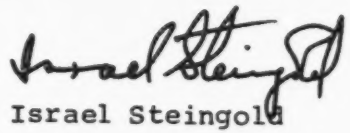
"It is possible that the law is moving more and more towards the idea that choice of law is jurisdictional, and that the fact that the law of the place is applicable provides the minimum contact necessary to permit this State to exercise in personam jurisdiction under the due process clause of the 14th Amendment. (Emphasis supplied.) See comment 19 Wash. & Lee Law Review, 271, (1962). However, this Court would not have to go that far to assume jurisdiction in this case, since subjecting these defendants to in personam jurisdiction would be constitutionally no more obnoxious than asserting jurisdiction under a single act

long arm statute, and from the indications already discussed, this Court has little doubt that the Supreme Court will ultimately hold such statutes constitutional.

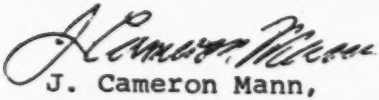
"For the reasons stated above, the defendant's motion to dismiss for lack of personal jurisdiction will be overruled."

CONCLUSION

It is respectfully submitted, therefore, that the Petition for Writ of Certiorari is without merit and should be denied.



Israel Steingold



J. Cameron Mann,
Counsel for Plaintiff

AFFIDAVIT OF SERVICE

STATE OF VIRGINIA,

City of Norfolk, to-wit:

We, Israel Steingold and J. Cameron Mann, Attorneys of record for Ajax

Realty Corporation, Appellee herein, depose and say that on the 6th day of April, 1973, we served a copy of the foregoing brief on Durell Products, Inc., Petitioner herein, by delivering the same to Allan S. Reynolds and E. Preston Grissom, Counsel of record for the said petitioner, at their offices located at 906 One Plaza East, Norfolk, Virginia 23510.

Israel Steingold

J. Cameron Mann

Subscribed and sworn to before me at Norfolk, Virginia, this 6th day of April, 1973.

Notary Public

My commission expires May 31, 1976.